No. 12,596

IN THE

United States Court of Appeals

For the Ninth Circuit

CHAN SHING HO, also known as Jack Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

APPELLANT'S REPLY BRIEF.

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INTRODUCTION.

In his opening statement to the jury, counsel for the Government stated as follows:

That the Government would prove that in 1941 at a meeting of the business partnership which had theretofore owned and operated the Palace Market at 816 J Street, Sacramento, the partnership had dissolved; that the defendant Jack Chan had thereupon become the sole owner of the business; that thereafter he had owned and operated the business as an individual and that after the dissolution Jack Chan had set up a fictitious continuation of the partnership to evade in-

come taxes. No claim was then made, or during the prosecution's case that there was any other tax evasion perpetrated or attempted.

As a part of the prosecution's case an elaborate mimeographed statement (Pltf's Exhibit 39) was prepared and handed to the jury and thereafter carried by them throughout the trial lasting over a period of fifteen days. This was a "balance sheet" based entirely upon what special agent Englund said that Defendant Jack Chan had said were the assets and liabilities of the business of the Palace Market—*and treating the Palace Market as solely owned by defendant*—at the beginning of the period and thereafter through 1946. According to this balance sheet it was claimed that appellant's net worth increased from minus $762.78 to $83,113.11 during the four year period.

The government in its brief says:

> *"The evidence clearly established, however, that no partnership was in existence during these years."**
>
> (Appellee's Br. p. 4.)

Willfulness and fraud by which the taxpayer used a defunct partnership as a basis for evading his income tax obligation was thus the theory AND THE ONLY theory seriously urged.

Therefore, if the record shows that such dissolution was NOT proved, then the whole structure of the Government's case—the sole and only proof of willful intent—falls like a house of cards.

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*Emphasis ours throughout unless otherwise noted.

WE SUBMIT THAT THE EVIDENCE CLEARLY ESTABLISHES THAT NO TERMINATION OF THE PARTNERSHIP OCCURRED UNTIL AFTER 1946 ALTHOUGH CERTAIN PARTNERS AS THE RETURNS SHOW WERE BOUGHT OUT IN 1945, 1946.

It is conceded that there WAS a partnership and that it existed from 1923 at least until 1941; that there were some twenty-five partners, whose several interests are undisputed; that various of these partners worked for the business; that from the inception of the partnership, Mr. Chan ran the business as the sole manager, signed all the checks, paid all the bills (when he could) and made all the decisions.

If, then, there was a termination of the partnership some words or acts must have terminated it. Some agreement, oral or written must have been entered into and must have become executed. How else is the termination of a partnership effected?

Throughout this case, and in the arguments, we have been using the word "dissolution." This is loose use of language, "termination" is the proper word. California (in common with most of the states) has adopted the uniform partnership act. This act is now embodied in our Corporations Code. Sections 15029-15043 (Article VI) cover the dissolution and winding up of partnerships.

Section 15030 provides:

> "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

No purpose will be served by a technical dissertation upon the question of partnership dissolutions or the distinctions between the dissolution and the

termination, or winding up, of the affairs of the partnership. The question here is simply this: Did the partnership end before 1943? Was there a formal agreement between all the partners, written or oral; did the defendant Chan buy his partners out, and become the sole owner of the business?

If the partnership did end—if defendant Jack Chan did become the owner of the business what FACTS —what words or acts of the partners accomplished this?

We have shown how defendant Jack Chan, always sole managing partner before and after, went to China in 1940 to bring home a wife, how two meetings of the partners were held in 1940, one during his absence in which the financial condition of the partnership was discussed, the other when Mr. Chan returned and in which he was reappointed managing partner and beseeched to parry and pacify the partnership's creditors. (Appellant's Br. pp. 16-18.)

The FACTS in evidence show the subsequent events to have been as follows:

(1) That between 1940-1945 defendant Chan continued to run the business *precisely as before.* Some of the working partners, employees of the store, quit their employment in and around 1940 but when they left *not a word was said about terminating the partnership.*

(2) The minute book is in evidence. It shows no meetings held or mention of dissolution.

(3) During 1945-1946 Mr. Chan commenced to buy out his partners at their request. The first part-

ner who took any affirmative action to withdraw was George Chan. In 1945 he entered into a written agreement with Jack Chan prepared by George Chan's lawyer, selling his interest in the business to appellant.

(4) The Foo Chong interest was bought out in 1946. It was evidenced by written agreement.

(5) Harry Young (Young Poi Gay) was bought out in January 1947. Later the others were bought out. The purchases by Chan were not at his solicitation. The offers were made by the several partners, accepted by the defendant. (Appellant's Br. pp. 19-30.)

These are the FACTS. They are uncontroverted and uncontrovertible facts. Appellee, in his brief, claims as follows:

First, that "the defendant *clearly* admitted to the investigating agents that he had enjoyed exclusive ownership of the business, at least from 1943 on. (Appellee's Br. p. 9.)

Second, that "the testimony of the other alleged partners who testified at the trial likewise supports the conclusion that no partnership existed during the period in question." (Appellee's Br. pp. 9, 10.)

Third, "strong circumstantial evidence points to the same conclusion." (Appellee's Br. p. 11.)

We will discuss these claims seriatim. If they can be sustained, they can only be sustained by evidence, legal, relevant and admissible, sufficient to prove guilt to a moral certainty and beyond a reasonable doubt.

A mere scintilla of evidence is insufficient to support a verdict. The prosecution does not sustain its burden unless the evidence is sufficient to justify men and women of ordinary reason and fairness to find the defendant guilty to a moral certainty and beyond a reasonable doubt.

The rule that this Court must consider the evidence in the light most favorable to the prosecution does not mean that merely *any evidence at all,* or *inference without evidence* is sufficient to sustain a verdict.

So to hold would render empty and meaningless the equally well-settled rule that in a criminal case the defendant's guilt must be established "to a moral certainty and beyond a reasonable doubt." The evidence which is sufficient, and that which is insufficient, to produce such a state of mind has been at least, with generalization, defined.

Says Mr. Wigmore:

> "The question is thus presented, in determining this sufficiency of evidence to go to the jury, whether there are any detailed *tests to control or guide the judge** in his ruling.
>
> "The ruling will, in truth, depend entirely on the nature of the evidence offered in the case at hand * * * There is no virtue in any form of words." (9 Wigmore on Evidence, 3rd Ed. Sec. 2494 p. 296.)
>
> "A mere scintilla of evidence is insufficient to sustain a verdict" (9 Wigmore on Evidence, 3rd Ed. Sec. 2494, p. 296, note 11 citing among other authorities: *Commrs. v. Clark,* 94 U.S. 278; 284; 24 L. Ed. 59, 1897; *Gunning v. Cooley,* 281 U.S. 90; 74 L. Ed. 720.)

*Emphasis is the author's.

> "Perhaps the best statement of the test is this: 'The proposition cannot merely be, Is there evidence? The proposition seems to me to be this: *Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?* (citing cases.)" (9 Wigmore on Evidence, 3rd Ed., p. 299, Sec. 2494, "Sufficiency of Evidence".)

Adopting these statements we will now examine appellee's evidence claimed to prove the termination of the partnership to see if it meets the test.

Mr. Chan's so-called admissions were not admissions at all. Construed in their context the full statement is an assertion of an existing partnership in 1943-1946. Even stripped from its context it is an expression of opinion.

Appellee states:

> "Special Agent Englund testified that the defendant had told him that the partnership was discontinued in 1941 * * * and that he said business all mine since 1941." (Appellee's Br. p. 9.)

As noted in our opening brief, times, places, parties present, the gist of the conversation, as distinguished from the witness' characterizations were not related. Received over objection, these were merely vague summarizations. Although the witness had kept a diary, he produced no record of the conversations.

In our opening brief we cited and quoted from *O'Neill v. United States*, C.C.A. 8th Ct., Apr. 22, 1947, 19 F. (2d) 322, wherein the rule is said to be well settled "that a witness who has heard a statement or conversation should not be permitted to state his conclusions as to what was stated or admitted".

Reasons for the rule are obvious. How can one pin down or cross-examine a vague characterization particularly when made by an obviously zealous prosecuting witness? How can one ascertain the context of, and circumstances surrounding, the statement? *When we do get to a statement where ALL of the statement is before us, we find that the appellant's so-called admissions are not admissions at all.*

That is why the "sworn statement" of defendant Chan dated January 19, 1948 (Pltf's Exhibit 40) is so significant. Plaintiff's only use of this statement is to strip from the context a single phrase

> "* * * 1940 I went back to China and then '41 all partners everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all."

And having stripped the phrase from the context appellee claims that this is an admission by the defendant that there had been a legal termination of the partnership in 1941. Before we answer this, *may we put the phrase back into its context?* In Appendix A to this brief (infra p. i) we have set forth ALL the questions and answers which relate to the termination of the partnership and in the order of their statement.

Contained within its context and read as a whole, the statement of Mr. Chan is a statement over and over again that there was a partnership in 1945 with twenty-five partners, reduced in 1946; then when the partners reached an agreement with Mr. Chan and

retired from the partnership they then received their original investment back.

There were various partners who were employed by the business—"working partners". When Mr. Chan returned from China business was bad and the working partners quit their employment. Later in 1945 Mr. Chan, as his partnership returns show, started to buy them out and in 1946 continued the purchase. "Now the business mostly mine, mostly mine."

Thus stated, the statement is completely in accord with all of the FACTS in the record.

Stripped of the context " '41 all partners everybody dropped out of business" is an ambiguous statement. It could mean (as it obviously does mean read IN its context) : " '41 all partners quit working for the business". Construed as meaning, "In '41 all partners withdrew from the partnership which was thereby terminated" it is an expression of opinion.

An opinion by a lay witness is valueless as evidence and therefore inadmissible.

We will discuss the Opinion rule hereinafter in connection with the testimony of the other witnesses.

Appellee seeks to find corroboration in statements by other witnesses.

No fact was testified to by any witness justifying an inference that the partnership had terminated. No such statement of fact (distinguished from opinion) was ever made to a government agent.

On page 10 of appellee's brief three witnesses are referred to who are claimed to corroborate the termi-

nation of the partnership, Henry Chan, George Chan, and Harry Young. As to Henry Chan, appellee claims "Henry Chan * * * testified that he talked with the taxpayer about the middle of 1939 about withdrawing from the partnership and that it was thereafter *his understanding* that he had withdrawn as a partner." (Appellee's Br. p. 10.)

Appellee concedes that the testimony of George Chan as to *facts* was that in 1945 he assigned his interest in the partnership to Jack Chan. To impeach this testimony appellee calls attention to another question and answer statement made during the investigation in which he is stated to have stated "that the partnership terminated in 1941 and that he was a partner from 1927 to 1941 only."

The third witness, Harry Young, is said by appellee to have said that he "definitely thought he was out of the partnership in 1941."

This is not a fair summary of the testimony of any of these witnesses. We have set forth in Appendix B attached hereto (infra p. iv) the testimony of the three witnesses, Henry Chan, George Chan and Harry Young.

It appears from this testimony that when the witnesses are testifying to the data from which inferences are to be drawn—i. e. when they are testifying to facts, it is clear that there was no word, act or deed which could possibly lead to an opinion or conclusion that the partnership had terminated.

Opinions by lay witnesses (with exceptions not important here) are inadmissible at any time. But where the data on the basis of which an opinion is expressed is in evidence and shows that the opinion is the expression of a legal conclusion not justified by the fact it is doubly inadmissible.

> "It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself' and this for two reasons, first, because the judge is to give an absolute sentence * * * secondly, the witness cannot be sued for perjury" (Lord Coke in Adams v. Canon (1622) Dyer 53b, reported in 7 Wigmore, 3d Ed. p. 2 Sec. 1917.

> "The judge might say: 'We want not your opinion; have you any facts? For we can guess and opine as well as you can; tell us facts, if you have them.' " (7 Wigmore 3d Ed. p. 2 Sec. 1917.)

An opinion by a lay witness is valueless as evidence and therefore inadmissible when the jury can be put into a position of equal vantage for forming an opinion by the relation of the facts by the witness from which the opinion is to be drawn. (7 Wigmore 3d Ed. p. 2, Sec. 1917.)

> "There is no more familiar principle in the law of evidence than that the opinions of witnesses are in general irrelevant. * * * Even when witnesses are limited in their statements to facts within their own knowledge, their bias, ignorance and disregard of the truth are obstacles which too often hinder in the investigation of the truth. If it were a general rule of procedure that witnesses might be allowed to state not only those matters of fact about which they are supposed to have knowledge but also the opinions they might entertain about the facts in issue, the administra-

tion of justice would become little less than a farce."

(*Jones on Evidence,* 3rd Ed., Sec. 359.)

There are, of course, exceptions to this rule. None of the exceptions apply to the instant case. As a matter of fact, the instant case is an excellent one to illustrate the rule. The FACTS show clearly there was no word, act or deed of any actor in this case which did or could constitute a termination of the partnership. Therefore the opinions expressed (usually not in court but in extrajudicial statements "I thought", "I considered", " '41 all partners quit business" can have no probative value, no relevancy whatever.

Where a witness testifies, "It was my understanding I had withdrawn from the partnership in 1941", "I call it terminated in 1941", or "I thought I was out, that is all", and where the data is all in evidence and it shows that nothing was stated in any conversations related from which an inference of retirement from, or termination of, the partnership could be justified, and where presence at meeting, letters and written agreements show that the persons expressing the opinions *were* partners until 1945-1946, the expression of the opinion becomes worthless as evidence.

This is recognized by the Model Code of Evidence.

"Rule 401 Testimony in Terms of Opinion.

(1) In testifying to what he has perceived a witness, whether or not an expert, may give his testimony in terms which include inferences and may state

all relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the judge finds * * *

> (b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudice of the objecting party.

(2) The judge may require that a witness, before testifying in terms of inference, be first examined concerning the date upon which the inference is founded." (American Law Institute Model Code of Evidence p. 199.)

The so-called circumstantial evidence of termination of the partnership was not evidence of that fact at all. Appellant's conduct in the operation of the business was precisely the same before as after the claimed date of termination.

Appellee states that "strong circumstantial evidence points" to the conclusion that the partnership had terminated prior to 1943. (Appellee's Br. p. 11.)

This "strong circumstantial evidence" is summarized by appellee as follows:

> "To summarize the evidence shows that during the years 1943, 1944, 1945 and 1946 appellant conducted the business of the Palace Market as the sole owner. He ran the business, signed the checks, distributed no profits to anyone else, acknowledged no duty to distribute profits and disregarded the requirements of both the original partnership agreement and the meeting held in 1940." (Appellee's Br. p. 13.)

The trouble with this argument is that the appellant's conduct has been exactly the same since the inception of the partnership, and during all of the period when admittedly the partnership was in existence. This has been abundantly shown in the review of the testimony contained in our opening brief. (Appellant's Br. pp. 15-19.)

Since the conduct before the claimed termination and the conduct afterwards is exactly the same, such conduct has no probative value whatever to establish the inference claimed for it by appellee.

Circumstantial evidence like testimonial evidence is relevant only where "the claimed conclusion from the offered fact must be a possible, or a probable or a more probable hypothesis, with reference to the possibility of other hypotheses. This is not only the general principle that best described the attitude of the courts but also the expressed form of the test for specific kinds of facts." (1 Wigmore on Evidence, 3d Ed., p. 428, Sec. 38.)

A quotation from the same author's text is as follows:

> (Quoting from Brickley C. J. in Levison v. State, 54 Ala. 528) " 'The rule is clear and well defined that facts and circumstances which when proved are incapable of affording any reasonable presumption or inference in regard to the material fact or inquiry are not admissible in evidence.' "

Section 1868 of the California Code of Civil Procedure states the rule as follows:

> "Evidence must be * * * relevant to the question in dispute."

This so-called circumstantial evidence has no probative value not only because the acts and conduct of the appellant were the same during the admitted existence of the partnership and before the claimed termination, but also because they are acts and conduct which are quite compatible with the existence of a partnership.

Sole management in one partner is a common and usual thing; disregard of articles of incorporation, by-laws and other written agreements regarding the holding of meetings, the making of financial statements, are—as every lawyer knows—more honored by disregard than by observance. The writer has never seen articles of incorporation or corporate by-laws, for example, which did not call for regular directors' meetings, annual shareholders' meetings. In small corporations these are seldom if ever held.

Appellant's failure to disclose or pay profits to the partners does not prove a termination of the partnership. It may prove a violation of a fiduciary duty by one partner owed to his other partners. It may even indicate an unauthorized appropriation of partnership funds, but it doesn't prove the non-existence of a partnership.

IT AVAILS APPELLEE NOTHING TO ATTEMPT TO SHIFT ITS THEORY OF THE CASE TO JUSTIFY A CONVICTION WITH THE PARTNERSHIP EXISTING IN 1943-1946. WITHOUT PROOF OF TERMINATION OF THE PARTNERSHIP THERE IS NO PROOF OF WILLFULNESS.

As was abundantly demonstrated in appellant's opening brief (pp. 5-7) the Government's whole case

was predicated upon a termination of the partnership.

Appellee now asserts "The evidence is sufficient to support the verdict even assuming the existence of a valid partnership as claimed by appellant." (Appellee's Br. p. 6.)

Appellee points to a $3,693.97 understatement of income by the appellant over the four year period as proof of "the existence of substantial tax deficiency" and states that this is also sufficient to establish "an inference of affirmative attempt to evade taxes without further evidence of willfulness". (Appellee's Br. p. 7.)

Appellee cites cases where "*false* returns" and "*intentional* omission of income" have been held to constitute willful tax evasion.

But appellee carefully omits to mention or even suggest wherein, in this case—assuming the existence of the partnership—any of the returns filed were false or where there was any intentional omission of income.

Appellant, on the contrary, has demonstrated beyond peradventure of doubt that there was *no* intentional omission of income; no false returns. Not one item of evidence in this regard was offered by the prosecution in this case. And when it came the appellant's turn to put on his case, he painstakingly brought forth his books, showed them to be full in every respect—and as accurate as most small businesses; showed how he had erred (as hundreds of

thousands of taxpayers have erred) in charging partners' wages and board as expense, in charging capital expenditures as repairs, and similar common accounting mistakes—mistakes which added up to an income tax deficiency, so far as the defendant's individual liability was and is concerned, of an average of $900 of unreported income (not tax) per year during the four years.

To argue that this constituted willful income tax evasion when on the very face of the returns and throughout the taxpayer's records the errors shriek and proclaim themselves is to argue an absurdity.

To argue that a conviction can be sustained on the grounds that the jury may have believed that the defendant was guilty of tax evasion in such minor errors when throughout 15 days the prosecution was busy persuading its members that the defendant had set up a phony partnership to hide his taxes, is to argue an outrageous thing. Such an argument postulates that if the prosecution in a tax evasion case can with a false theory persuade a jury to return a verdict of guilty, the conviction can be sustained if ANY omission of income can be found in the taxpayer's returns.

There is some suggestion in the brief of appellee that Mr. Chan accumulated great wealth during the period 1943-1946 on which he paid no income tax. This is not borne out by the record. The computations of the public accountants (Defendant's Exhibit CC) not challenged by appellee—if the partnership existed during the period—show that the total

unreported income received by appellee during the four years is $3,693.97. Appellee concedes:

> "The differences between appellant's computations and those of the prosecution are not significant when the partnership question is eliminated." (Appellee's Br. p. 18.)

Mr. Chan does not have great wealth and did not have, or acquire, wealth during the period in question. He took money owed him by the partnership for back wages, borrowed more from the partnership and made a down payment on a piece of real property. Working hard, he and his whole family, Mr. Chan during the years 1943-1946 increased his net worth by $25,145.58 (Defendant's Exhibits BB and CC) of which he reported and paid income tax on $21,451.61.

A PROSECUTION BASED, AND CONVICTION REACHED, SOLELY UPON AN EXTRAJUDICIAL ADMISSION OF THE DEFENDANT CANNOT BE SUSTAINED.

However skillfully appellee may try to argue otherwise, it has now become clear that it must rely exclusively upon the claim that a statement by the defendant: " '41 all partners, everybody dropped out of business * * *" as the sole evidence to establish the all-important, indispensable, claim of partnership termination.

Granting to the statement (solely for the purpose of argument) all the force and credence contended for it by the prosecution, they cannot deny, and they do not deny, that it is an extrajudicial admission.

The opening brief (pp. 95-111) argues the proposition that a conviction based wholly upon extra-judicial admissions, cannot be sustained. The authorities stated therein so holding are full and conclusive. We cited and quoted from: *Forte v. U. S.* (CCA Dist. Col., Apr. 5, 1937), 94 F. (2d) 236; *Pines v. U. S.* (CCA 8th Ct., Dec. 5, 1941), 123 F. (2d) 825; *Gullotta v. U. S.* (CCA 8th Ct., July 24, 1940), 113 F. (2d) 683; *Gordiner v. U. S.* (CCA 9th Ct., Jan. 7, 1920), 261 F. 910; *Martin v. U. S.* (CCA 8th Ct., Apr. 9, 1920) 264 F. 950; *Nicola v. U. S.* (CCA 3rd Ct., Aug. 9, 1934), 72 F. (2d) 780.

In appellee's brief this argument and these authorities are not even mentioned. It must be concluded therefore that appellee fully agrees with what we said there and with these authorities.

If, therefore, as we contend, on the all-important issue of the termination of the partnership, on proof of which the whole case of the prosecution hinges, there is no evidence to show termination other than the defendant's admission, the conviction must be reversed.

NOT ONLY WAS THE PROSECUTION'S PROOF OF PARTNERSHIP TERMINATION BASED SOLELY UPON AN EXTRA-JUDICIAL ADMISSION; SO ALSO WAS ITS PROOF OF UNREPORTED INCOME TAX.

If the case of the prosecution failed with respect to the issue of the termination of the partnership then the conviction must be set aside and further argument becomes unnecessary.

For the sake of completeness of argument, however, it has been pointed out in the opening brief and should be repeated here that the whole case of the prosecution—in its claim of unreported income as well as in its claim of a terminated partnership—was constructed on a framework of extrajudicial admissions and *nothing but extrajudicial admissions* and therefore since the entire proof of unreported income as well as of willfulness rests upon admissions and the *corpus delicti* is not otherwise established, the conviction must be set aside on that ground.

Appellee states: "he (appellant) cites no case holding that the use of the 'net worth' method is conditioned upon a showing of the inadequacy of existing books and records, for there is no reported case which so holds". (Apellee's Br. p. 14.)

We respectfully suggest that appellee misses the point. We have cited, among other cases, *U.S. v. Chapman* (CCA 7th Ct., June 18, 1948; 168 F. (2d) 997; Appellant's Op. Br. p. 117), which holds that "in a net worth case *the starting point must be based upon a solid foundation and a revenue agent's statement of the defendant's oral admission or confession when uncorroborated is not enough to convict*".

In the *Chapman* case the starting point *was* based upon a firm foundation—the defendant's books and records were the basis of the net worth statement. In that case the figures contained in the defendant's extrajudicial statement were corroborated by the books and records.

We say that appellee misses the point because the vice in its argument is not in the use of a net worth statement. It lies in the use of extrajudicial statements exclusively when accurate proof was at hand. Net worth statements, or balance sheets, which are based upon true books and records, produces a result as accurate as a profit and loss statement (i.e., an income statement) taken from the same books.

While it will be profitless to engage here in academic technical argument on the issue of "net worth" statements versus profit and loss statements to show income, it may be stated in passing that use of any net worth statement may be open to the same criticism as the statement by a witness of an opinion or conclusion when the basic data upon which the opinion is based is equally available and at hand. The profit and loss statement, or income statement, is the statement of the income itself, whereas computations of income based upon periodical balance sheets, is a drawing of inference upon inference the accuracy of which depend upon the accuracy of the basic data.

Since the basic data—all books, records, cancelled checks, bank statements, check stubs, etc.—necessary to show all the defendant's income were available here it was unnecessary for the government to use a "net worth expenditures" method at all.

But the principal complaint is not use of the "net worth" method—it lies in the fact that the government agents, under the pretext that the books and records were inadequate (principally because their Chinese interpreter could not speak the Chinese dia-

lect in which they were written!), were satisfied to disregard all such books and records and to base their case solely upon the claimed extrajudicial statements of the accused.

We say that the government's case is based "solely" upon extrajudicial statements advisedly. The foundation of the "net worth expenditure" method is the beginning net worth. As stated in the *Chapman* case, if the "foundation" is firm the increase in net worth will show income; without this firm foundation the method is valueless for that purpose.

That which the government claims to have been the beginning net worth of the defendant, his net worth on January 1, 1943, is based entirely upon what the defendant told the agents. The evidence which would have actually established that beginning net worth was completely disregarded. (We refer to the books and records and the defendant's explanation of them.)

In our opening brief we have demonstrated how the government's beginning net worth statement was made up wholly of claimed extra-judicial statements —what the agents said that Chan had said. Cash on hand, accounts receivable, war bonds, value of equipment (upon which a manifestly absurd figure was placed), value of furnishings and personal jewelry, all these assets were proved by this hearsay. On the liability side, the same is true. Every item in the liability column was based on what the agent had said that the defendant had said. And almost all of this evidence was untrue. (Appellant's Opening Br. pp. 63-68.)

Appellee refers to the fact that at the trial in cross-examining the defendant's accountant James SooHoo, it was able by a series of hypothetical questions and assumptions to extract from the witness a negative net worth of $17,599.00 at the beginning of 1943.

This was a trick designed to, and which undoubtedly did, persuade the jury that the defendant's own witness was convicting him of income tax evasion.

Actually all that the government was doing was re-establishing its own beginning net worth statement as correct *by assuming that all of the extrajudicial statements upon which it was based were true.*.

Mr. SooHoo was asked, not to assume that the partnership had terminated, *but that it never had existed.* For example, one of the defendant's principal assets at the beginning of 1943 was an indebtedness owed by the partnership to the defendant for back wages in the sum of $8,100.00 and other clearing account items of $4,658.24, a total of $12,758.24. Now obviously, even if the partnership had been terminated, this debt was not wiped out unless there was some agreement to that effect and there was not the slightest evidence in the record of any such agreement. Yet Mr. SooHoo was asked to assume the non-existence of over $12,000 in assets. This is merely illustrative of (1) the unfairness of the prosecution and (2) *its determination to keep the case firmly on a basis of trial by confession and not of evidence.*

The beginning net worth of Mr. Chan, the true beginning net worth as shown by the defendant's books and the FACTS elicited at the trial is shown in De-

fendant's Exhibit BB. It shows a beginning net worth of $15,856.26.

The beginning net worth as claimed by the prosecution and based wholly upon the claimed extrajudicial statements of the defendant to the government agents, uncorroborated by any other fact in the record is minus $762.78, a difference of $16,619.04. (Plaintiff's Exhibit 39.) The false net worth statement constructed by the government during the trial through the medium of constituting the accountant James SooHoo, the prosecution's "Charlie McCarthy" and compelling him to assume the truth of the claimed extrajudicial statements relied upon by the prosecution, showed a beginning net worth of minus $17,599.29 or a difference from the net worth as shown from the other evidence of $33,455.55.

And yet appellee, without apparent embarrassment says:

> "Appellant's income was properly computed on the basis of his increase in net worth." (Appellee's Br. p. 14.)

Appellee also insists that the "net worth" computations of the government made on the basis of extrajudicial admissions were corroborated. (Appellee's Br. p. 21.)

It points to:

(1) The bank statements of three bank accounts admitted in evidence and stipulated to;

(2) Various cancelled checks;

(3) Stipulations covering the purchase of real property.

Appellee concludes:

> "In view of this volume of documentary evidence it can hardly be maintained that there was no corroboration for the defendant's extrajudicial admissions as to the items of assets and liabilities comprising his net worth." (Appellee's Br. p. 23.)

Obviously, cancelled checks without any explanation of any kind are NOT corroboration of anything. These cancelled checks WERE as a matter of fact explained by the evidence of the defendant given at the trial and this evidence, far from corroborating the claimed extrajudicial admissions, showed that the checks were issued for wholly different purposes from those claimed by the prosecution. (Appellant's Opening Br. pp. 60, 61, 62; 69, 70, 71; and see Defendant's Exhibits AA, BB and CC Appendix.)

It appears to us to be equally obvious that a stipulation by parties of one, two or several items making up a long account can hardly be stated to be "corroboration" of the accuracy of the total account which by the evidence is shown to differ by $33,455.55 from the claimed extrajudicial admission.

CONCLUSION.

We assert that at this point in the study and review of the evidence there can be no doubt *where the truth lies.*

The Palace Market, a partnership of some twenty-five Chinese, a number of whom are working part-

ners and one of whom has been the manager and sole boss for many years, suffered business reverses during the 30s, saw these reverses multiplied when the boss went to China in 1940. A meeting of the partners was held during his absence and steps were discussed to plug the dike. Jack Chan, the boss, returned; another meeting was held; he was voted back at the helm. In 1941, working partners, discouraged, left the employ. Jack Chan continued to plod along. The war came and with it a measure of prosperity. The defendant, Jack Chan, without bothering to consult his partners, repaid himself his back wages and loans to the business. This, he was entitled to do. He used this money to acquire assets—real property. The total was not enough. So he borrowed from the partnership funds to make up the difference. This he was probably not entitled to do. Then in 1945 and 1946 he commenced to buy his partners out, at purchase prices not based upon the valuations then of the partners' interests but on the basis of their original investments.

This is the truth in this matter. The testimony, records, minutes, letters, agreements, cancelled checks, books, all leave not the slightest doubt of this.

Does this truth, thus stated, constitute the defendant guilty? Obviously not of income tax evasion. The money which he used to acquire his "net worth" in 1945-1946 was not income. There was no termination of the partnership and the money used was not his money, it was the partnership's.

Did the jury believe that the partnership had terminated—a fact which, as we have seen, is the indis-

pensable fact to be proved by the prosecution? Or did it simply fail, or refuse to distinguish between income and "borrowed" funds and convict the defendant for failure to pay income tax on the latter?

It is idle, perhaps, to speculate upon the analysis of this case made in the jury room.

Of course, the fact that each member of the jury had had in his or her possession for a period of 15 days Plaintiff's Exhibit 39 (to the exclusion of all other items of evidence) and had stared at the sum of $83,113.11 conjured up by the prosecution as the sum accumulated by Mr. Chan from "income" during the four year period, may have speeded them in their analysis.

Perhaps the frequent references to the defendant's black market operations by the United States Attorney was not without its effect also.

Dated, Sacramento, California,
November 20, 1950.

Respectfully submitted,
MULL & PIERCE,
A. M. MULL, JR.,
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By F. R. PIERCE,
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(Appendices A and B Follow.)

Appendices A and B.

"Q. Was their original investment paid back to them when they terminated, when they left the partnership?

A. I pay them * * *

Q. If they left the partnership, did they receive their original investment back?

A. Yes * * *

Devine. There were twenty-five partners in 1945, and there were ten in 1946?

A. Yes, mam."

(At this point in the statement occurs the following interlineation made by the defendant in his own handwriting.)

"1946 10 partners J. C."

"Devine. Here I have the names of fifteen partners that were partners in 1945 but were not shown as partners in '46. I'll go down the list and will you tell me how much you paid each one when he left the business in 1945? The first one is Chin Wing * * *" (the witness then proceeded to state the payments and the method of payment.)

"Q. What year did Chin Ling leave the partnership?

A. 1935.*

Q. Were all these partners in 1945? (Pointing to the partnership return for the year 1945.)

*This is an obvious error corrected two questions later, "1945" is intended.

I hand you herewith a partnership return indicating various partners * * * Is this the names of the partners? * * * *Were they members of the partnership in 1945?*

A. *Yes. Yes.*

Q. Let's see; *you have Chin Ling listed. Was he a member of the partnership in 1945?*

A. *Yes.*

Q. Was he a partner in 1946?

A. 1946, no. 1940 I went to China and then '41 all partners, everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all. I told partners I will pay everybody. I was working hard and every creditor we pay month by month and year by year everybody. Partners don't want in. I give money back. I pay everybody back for the partner capital. Somebody dropped so I pay back cash. I been here about thirty years, and I don't want to owe anyone. I pay them back because I don't owe one penny. My wife, my whole family work. Everyone, in other words, *now* the business mostly mine, mostly mine. Stay or let them go. We give money back see.

(Without a single question to produce an explanation of this highly ambiguous statement the questioners then continued to question Mr. Chan and he answered regarding the amounts paid to various parners, e.g.)

Devine. Chan Tim. How much did you pay him in 1946?

A. He got $1,000.00 * * *

Devine. Lai Cung Nam. Was he a partner in 1946?

A. No, I think not * * *

Q. Now all these partners, fifteen of them were repaid for their original investment in 1946, is that right?

A. Yeah, but some partners he draw some money for long time ago, and when some partner he draw some money, and then when we pay back, we don't pay what he draw before.

Q. When you formed the partnership, were all the members residents of the United States at that time?

A. Some were in China, either 1946 some were in China."

Appendix B

Henry Chan.

Henry Chan testified that he had left the employ of the partnership in 1939 to go into business for himself. When he left he had a conversation with Mr. Chan but did not remember what was said in this conversation. (R. 3, pp. 791, 792.) After he left he had a conversation with Mr. Chan about paying him his interest in the partnership. This was after the war period; some time after the war started. (R. 3, p. 793.) It was a very casual conversation and he couldn't remember what Chan said: "I don't think he said he was going to give it to me. That is all." (R. 3, p. 794.) He said that was the first conversation he had had with Mr. Chan about withdrawing his partnership interest. Although he couldn't remember at first being present at the meetings of the partnership held in 1940, he finally identified his signature (Chinese) on the minutes although his recollection had been the meetings were later. (R. 3, pp. 797, 798.)

On cross-examination, he stated that when he left the employ of the partnership he said he wanted to withdraw from the partnership but didn't know whether Jack Chan had consented or not and his partnership interest was never returned. In answer to a leading question by Mr. Seawell, the witness gave a monosyllabic affirmative to a question calling for his opinion that "after the conversation with Mr. Chan" it was "his understanding" that he had "with-

drawn from the partnership". Whether as an employee or partner was not mentioned. Nor was any portion of any conversation from which such opinion could be drawn expressed. (R. 3, p. 801.)

(The question calling for the opinion and conclusion of the witness was deliberately asked by counsel notwithstanding that the question immediately preceding it in practically identical form was objected to and the objection sustained.)

George Chan.

It is claimed that by impeachment it has been established through Mr. George Chan that the partnership had terminated. Mr. George Chan had been questioned by the agents who followed their usual policy of attempting to ascertain facts by leading questions calling for opinions and legal conclusions:

> "* * * as far as you are concerned, you dropped out of the partnership in 1941, is that correct?
>
> A. I call it terminated then." (R. 3, p. 820, lines 13-25.)

However, when asked to relate facts and not conclusions the witness testified

> "* * * before the time when you quit did you have any discussion with Jack Chan about quitting?
>
> A. No sir.
>
> Q. At the time you quit, did you talk with Jack Chan?
>
> A. I did.
>
> Q. Who was present at that conversation?

A. Just me and Jack.

Q. And where did the conversation take place?

A. Palace Market.

Q. Will you state what was said at that time?

A. Oh, I think—I was leaving * * * to go in business for myself. I believe that is what I told him.

Q. * * * and what did he say?

A. Oh, let's see—sorry to see me go, I guess 'Best of luck, or something'.

Q. Did he say anything about the partnership being dissolved at that time?

A. No sir. * * *

Q. When did you first have a conversation with Jack Chan about terminating your membership in the partnership?

A. About 1946." (R. 3, p. 807, line 13—p. 808, line 13.)

(The witness was shown his agreement in writing in March 1945.)

"Q. All right. Now, refreshing your memory from that agreement can you tell me approximately the time that you had a conversation with Jack Chan about quitting the partnership.

A. I believe the matter was handled through Mr. French so if that is the date that was on there, it must be the date I saw Mr. French regarding the matter of dissolving the partnership with him.

Q. * * * Now, did you talk to Jack Chan before you went to see Mr. French?

A. I don't think I did.

Q. * * * But did you have Mr. French handle this for you?

A. Yes sir." (R. 3, p. 809, line 12—p. 810, line 3.)

Harry Young.

Let us now test appellee's claim that Harry Young testified *"definitely"* that *he thought* he was out of the partnership in 1941.

The following is his testimony:

"A. * * * I know I got a partnership with Jack Chan. (R. 3, p. 830, line 21.)

A. * * * I worked there for the partnership for a little while. (R. 3 p. 831, line 4.)

Q. * * * Do you remember when Jack Chan returned from China in 1940?

A. Yes sir.

Q. Did you have a meeting with him after he returned?

A. Yes, sir.

Q. And whereabouts?

A. Palace Market.

Q. * * * Did you have a conversation with Jack Chan, talk to him about buying out your interest?

A. Uh uh (negative).

Q. Did you have any talk at the meeting about getting rid of the partnership?

A. We don't say much at that time. (R. 3, p. 831, lines 7-22.)

* * * * * *

(The witness having testified to a meeting which he thought was in 1941 (actually in 1940) testified:

Q. What did you say at that meeting?

A. I don't say nothing. I sit down that is all. I tell you the truth.

Q. * * * and what did the other people say at that meeting?

A. People say 'Put Mr. Chan on pricing* job' that is all.

Q. During that time did Mr. Chan agree to buy you out, your interest in the partnership? * * *

A. No I didn't get no money in 1941.

Q. * * * Did he agree to buy that in 1941 from you?

A. I don't know that, he don't tell me about it. * * *

Q. Did you ever agree to sell that to him?

A. Yes, I sign.

Q. When?

A. I forget when, what year I sign. (R. 3, p. 833, line 18 — p. 834, line 15.)

Q. * * * Your interest in the partnership ended in 1941?

A. No, I don't say that.

Q. Didn't you say that?

A. No.

* * * * * *

Q. Isn't it true that your interest did end in the partnership in 1941?

A. Not true, yes in 1941.

Q. Didn't you get out of the partnership in 1941?

A. I don't know, that time I say nothing.

* * * * * *

---

*We think he meant "present".

Q. But didn't you think you were out of the partnership?

A. I thought myself, I thought I was out, that is all." (R. 3, p. 838, line 13—p. 839, line 13.)

(The witness then discussed the letter which is Defendants Exhibit K and which is set forth in the Appellant's Opening brief p. 21 and in which is dated January 11, 1947 and which speaks of a present interest of Young in the partnership and requests Jack Chan to buy him out.)

"Q. You wrote this letter?

A. No, my friend.

Q. You never wrote this?

A. No, I no write good, I not understand good, my friend write it.

Q. Did you tell him what to say in there?

A. Yes." (R. 3 p. 840, lines 6-12.)